

Thank you for the work that you and Ecology's stormwater team have done to draft a permit to help ensure compliance with the Clean Water Act and Washington State's water quality standards. With the addition of monitoring, clarification of the pollution prevention plan requirements and stated restriction of compliance schedules, the permit comes closer to creating a system that will foster compliance with water quality laws. These are substantial improvements over the current permit that has been in place for the past six years.

PEER joined the appeal of the initial draft permit at the request and suggestion of public employees, current and former, who were concerned that it violated the intent of the Clean Water Act and failed to provide adequate oversight to prevent water quality degradation.

PEER's comments request several changes to ensure the permit meets legal requirements, protects water quality, and does not create workloads or expectations that cannot be fulfilled by the Washington State Department of Ecology (Ecology). The requested changes will also help support the environmental goals that Ecology and EPA agreed to in their current Performance Partnership Agreement (PPA). The PPA is a binding contract that defines the environmental goals for Washington State, asserts the terms and conditions under which Ecology receives federal funds to fulfill their contractual obligations for air quality, water quality, and hazardous waste management, and defines accountability measures to assess the results achieved. As stated on page four of the PPA, *"This agreement constitutes the Ecology and EPA work plan for the award or continuation of these grants."*

The contract's stated goals for water quality are to:

- *Meet water quality standards in water bodies that are currently polluted;*
- *Meet the biological needs of endangered and threatened species; enhance chances for recovery;*
- *Restore and protect water quality through inclusive watershed planning;*
- *Achieve environmental protection through compliance assurance.¹*

PEER fully supports these goals and the need to further improve the industrial stormwater permit to meet them.

To some extent, the shortcomings of the draft permit reflect Ecology's budget deficit and the state's failure to create sufficient and stable funding to finance environmental protection and Ecology's associated mandates. PEER fully supports the need for a thorough and objective evaluation of Ecology's current permit fee structures, including the industrial stormwater permit, and legislative authorization to adjust the permit fees so they are adequate to help Ecology carry out its mandates. This is unlikely to happen without support from the public. Such support is unlikely to come forth until the general public understands how the current situation is contributing to degradation of public waters and a triage approach to technical assistance and enforcement.

Our core comments below are followed by specific comments on the referenced draft permit conditions. For ease of reply, we have numbered each of our comments (C1, C2, C3, ...) Thank you in advance for your response to them and your full consideration of the changes needed in

¹ US Environmental Protection Agency and the Washington State Department of Ecology, July 18 2001, Environmental Performance Partnership Agreement for July 1, 2002 – June 30, 2003, page 4.

order to create a fair and effective permitting structure to minimize pollution from the 1,300 + industrial facilities that will be covered by the Industrial Stormwater General permit.

Core Comments

C1) Although substantial improvements have been made from the current permit, in places the proposed permit lacks adequate provisions for Ecology to assess and advance compliance with the law, places Ecology at risk of future litigation, and creates conditions that will contribute to more water quality degradation.

To remedy this predicament, Ecology should delete from consideration all special provisions and allowances for which Ecology lacks the resources to provide adequate oversight, monitoring, determinations, and associated assessments as required by state and federal laws. We believe this action is needed because some of the proposed allowances will violate the law (in practice), create inequities, and divert Ecology's limited resources to the administration of special favors, such as mixing zones, rather than the administration of a level playing field and adequate technical assistance to the permittees.

C.1.a. If Ecology lacks the resources to adequately assess and oversee mixing zones, exposure certificates, and other special provisions, such provisions should be prohibited and eliminated from the permit. Mixing zones cannot legally be authorized by Ecology if Ecology does not have the resources to define, evaluate, and assess them as required by the Clean Water Act and WAC 173-201A-100, Washington State's mixing zone regulation.

C.1.b. If Ecology lacks the resources to review the Stormwater Pollution Prevention Plans, the proposed permit is largely ineffective. Ecology defines the plans as "*the very heart of permit requirements*"² and as such they should be. However, the draft permit does not require the plans to be reviewed by Ecology nor does it require site checks to assess whether or not the plans are ever implemented. If the plans are not going to be reviewed or assessed with site checks, they should not be the heart of the permit. To remedy this, Ecology's limited resources should be directed at technical assistance and enforcement actions to ensure that the plans and associated AKARTs are in place and functioning. The heart of the permit requirements has no pulse if resources are not directed to it so that staff can assist facilities with plans, conduct site visits, and enforce associated provisions of the permit.

C.1.c. Because Ecology's lack of resources erodes its ability to fulfill its legally mandated responsibilities, Ecology should seek legislative authorization to raise the permit fee, and honestly and factually inform the legislature, EPA, and the public that the current circumstances put Ecology at risk of failing to meet its legal mandates and having to spend public funds to defend itself from appeals and lawsuits from environmentalists instead of using the funds to carry out its mandates to protect the environment.

C.1.d. If PEER'S assertions regarding the lack of resources are incorrect, then Ecology's responsiveness summary to these comments should state as such and define: 1) how they

² Washington State Department of Ecology, March 19, 2002, DRAFT Fact Sheet for Industrial Stormwater General Permit, page 45.

will provide the legally mandated oversight, assessments, determinations, and associated actions to administer the special provisions proposed by the draft permit; 2) what resources they will use to do so; 3) and how the diversion of resources for such oversight will impact other elements of program administration such as the ability to conduct site visits, provide technical assistance, and enforce the law.

C2) The permit does not define how compliance will be assessed and enforced. While the permit clearly calls for compliance with water quality and sediment standards, this mandate is muted by numerous loopholes and provisions. Without closing the loopholes and defining more clearly how and when compliance will be checked, the permit has the potential to be a lengthy paper exercise where compliance is measured by whether or not paper work was turned in instead of assessing whether or not the facility is violating the law.

C.2.a. Along with other suggested modifications to close the loopholes (see comments under specific permit conditions) the General Conditions section of the permit should define how Ecology will evaluate the facilities for compliance with the permit provisions. A definition of compliance is a vital part of a functional permit system and an important part of notifying permittees of Ecology's expectations and compliance assessment methods and schedule.

C3) Because the permit will be used to regulate over 1,300 industrial facilities that discharge stormwater, it has the potential to either help—or hinder—salmon recovery efforts. Therefore, EPA and the Department of Ecology should complete Endangered Species Act (ESA) consultation on the permit.

The current Partnership agreement between EPA and the Department of Ecology requires that *“Major CWA programs and key projects will successfully undergo ESA consultation”*³ The general industrial stormwater permit constitutes a major CWA program and should not be finalized until a thorough consultation is completed. PEER fully supports the federal services right, and responsibility, to complete an ESA consultation on this draft permit.

Specific Comments Regarding the Proposed Draft Permit Conditions

S1. Permit Coverage

C4) Delete item S.1. B.1 (page 5) Facilities should not be able to escape coverage because they submit a form to Ecology. The no exposure element (page 29 of draft permit) should be rewritten to require more accountability and oversight and such requirements should be referenced here. If Ecology cannot provide adequate oversight to evaluate “no exposure” applications, then they should not be allowed.

C5) Delete item S.1.C.7 (page 7) which excludes facilities discharging to Section 303(d) listed waters from coverage unless they can meet the special conditions defined by S3D. The compliance schedule and associated conditions defined by S3D (page 17) allow polluters to discharge to 303(d) listed waters for five years and at the end of five years the “big hammer” is to discuss their compliance attempts via a report they are required to write in their SWPP. This condition fosters water quality degradation and is not acceptable. Rather than providing a

³ US Environmental Protection Agency and the Washington State Department of Ecology, July 18 2001, Environmental Performance Partnership Agreement for July 1, 2002 – June 30, 2003, page 58.

compliance schedule, Ecology could consider prioritizing technical assistance and enforcement to facilities in 303(d) listed waters that fail to comply with the law. In effect, these facilities have already had six years to install BMPS to reduce water quality violations. Although the new permit states effluent limits it does not impose new requirements to meet them other than BMPS—the same thing they were required to do six years ago. They do not merit another five. Allowing eleven years for compliance is a violation of the intent of the Clean Water Act and creates inequitable conditions. If anything, these discharges should be required to comply sooner—rather than later- because they are discharging to degraded waters.

C6) Enhance item S.1.E (page 8) to require coverage for facilities located in areas with porous soils, shallow aquifers, aquifers that have been defined by Ecology’s Aquifer vulnerability project (as described in Ecology’s year 2000 Section 305(b) report page 28) or other site conditions that increase the potential for groundwater contamination. As drafted, it appears that coverage would occur primarily after the fact as a result of complaints or contamination rather than pro-actively defining a prioritized list of facilities that should be required to comply with the permit conditions.

S2. Coverage Requirements

C7) S.2.B. coverage and SWPPS (page 8) - The permit should require all facilities to submit updated SWPPS. PEER fully supports the modifications to this draft permit that now require the facilities to have their SWPPs completed and implemented before a new facility starts operation (B.3.c) or an existing facility does a process change (B.4.c). We also fully support the definitions of completed and implemented that are provided.

However, as drafted, the requirement to submit updated SWPPs appears to be limited to new or process change facilities. This requirement should be extended to all facilities covered by the permit whether they have applications currently pending, are currently under permit, are existing facilities, municipal facilities previously exempt, or other such facilities that are currently not required to submit an updated SWPP.

To assist facilities with compliance, Ecology should consider working with several representative facilities to create model SWPPS that others could use as a starting point.

C8) S.2.B.5 - Mixing zones (page 10) - Provisions allowing for mixing zones should be deleted given Ecology’s resource constraints and the inequities that mixing zone allowances would create. Along with violating state water quality laws by creating inadequate determinations and not having the resources to administer mixing zones, the mixing zone provision creates inequities. Those who have the money and connections to pursue mixing zones will do so. Those who do not will be left to comply with the law without getting access to the loopholes.

S.2.C – Compliance Schedule (page 11)

C9) S.2.C. 1 and 2 (page 11) PEER supports the general provision prohibiting compliance schedules and commends Ecology for incorporating this into the revised permit.

C10) We adamantly oppose the provision allowing compliance schedules for the named facility types if such schedules are “authorized by Ecology in writing.” This provision sets up conditions that would foster inequities, political favoritism, an increased workload to haggle over

the allowances, and violations of a meaningful public involvement process. This provision should be deleted from the permit.

Ecology has a general policy of pursuing technical assistance and education prior to taking substantial enforcement actions. In the case of these permittees, this policy will likely serve them well by ensuring that they in effect, do have a grace period. This policy is an appropriate approach to a fair and effective compliance program for facilities regulated by this permit. A compliance schedule is not.

C11) S.2.D (page 11) – The public notice requirements must comply with 40 C.F.R. 124.10.(c) (1) (ix) and (c)(4). Ecology could facilitate notification by creating a page on Ecology’s website where citizens could list which WRIA they would like to receive notifications from. The permittee in turn could consult that list and ensure that the parties on it receive notification along with other standard “interested parties.” This would provide some assistance to the permittees and the public at limited expense to Ecology. The web page could also be used to list pending permits so that the public would be able to consider whether or not they wanted to request a public hearing. Otherwise, it is unclear how the public would know that a permit is pending for a specific facility.

These changes are needed in order to improve public participation and advance the environmental goal that Ecology adopted in its grant contract (PPA) with EPA. Namely to “*Restore and protect water quality through inclusive watershed planning.*”⁴ Inclusive watershed planning requires the involvement of the community –not just the chosen few on the watershed committees. Improved public notice would help remedy this.

C12) S.2.E.2a (page 12) – This item should be changed to ensure that along with notifying the applicant in writing and identifying issues that must be resolved, Ecology also notifies interested parties.

C13) S.2.F –(page 13) – PEER supports the provision stating that the permittee must comply with local government requirements and that the most restrictive of the two permits shall be followed.

In order to assist the permittees with this element, the final permit or fact sheet should include a contact list of local government stormwater personnel and associated resources.

It is unclear why coverage applications are required to be sent only to the six named local jurisdictions. If the local governments do not have copies of the industrial permittee’s application for coverage, it is unclear how they will help assess the facility’s compliance with local government requirements. Please explain why this is limited as such or consider extending the requirement to all local government jurisdictions.

S.3. Discharge Limitations

C14) S.3.D.1 (page 16) – This element must address how facilities will be handled if they get coverage and are not in 303(d) listed waters or waters with an established TMDL but later

⁴ US Environmental Protection Agency and the Washington State Department of Ecology, July 18 2001, Environmental Performance Partnership Agreement for July 1, 2002 – June 30, 2003, page 4.

find that the status of the waterbody has changed and they are in 303(d) listed waters. The permittee would need to be notified of this change to ensure compliance with the provisions that apply to 303(d) listed or TMDL waters.

C15) S.3.D.2. (page 17) – PEER fully supports the provisions requiring compliance at the point of discharge and Ecology’s incorporation of this provision.

C16) The proposed compliance schedule should be deleted from the permit. As stated in comment C5, this provision violates the intent of the Clean Water Act, creates inequities, and will contribute to degraded waters. In addition Ecology has not demonstrated how this compliance schedule complies with state and federal water quality laws and sediment criteria or that they have the resources to effectively administer the proposed compliance schedule and the increased workloads it would likely generate. For these reasons it should be eliminated.

S.3.E (page 18) – Mixing Zones

C17) As stated previously, the use of mixing zones should be prohibited. Mixing zones cannot legally be authorized by Ecology if Ecology does not have the resources to define, evaluate, and assess them as required by WAC 173-201A-100 and all associated provisions. State law requires Ecology to make a clear finding that the mixing zone would not have a “reasonable potential to cause a loss of sensitive or important habitat, substantially interfere with the existing characteristic uses of the water body, result in damage to the ecosystem, or adversely affect the public health.” (WAC 173-201A-100(4)). As drafted, the permit provides little assurance that an adequate evaluation would occur. In addition, Ecology’s constrained financial resources do not provide assurances that Ecology has the ability to administer the provisions and reviews required by law before mixing zones are allowed. Under these conditions, mixing zones should be prohibited.

S.4. – Monitoring Requirements

C18) PEER recognizes the challenge of creating a cost effective, yet meaningful, monitoring program for small industrial facilities that discharge stormwater and fully supports the inclusion of monitoring requirements and the associated requirements for visual inspections and SWPPS.

In order to improve the effectiveness of the monitoring we offer the following suggestions:

C19) S.4.4. This statement should be deleted and replaced with the statement in the fact sheet for the draft permit, which states that the monitoring must be preceded by at least 72 hours of no rain.

C20) The permit should reference the forthcoming monitoring guidance that is mentioned in the fact sheet for this draft permit. Along with sampling protocols, the guidance should provide a weather service phone number and website address that permittees could access to anticipate weather conditions and ensure they are sampling at the appropriate times.

C21) The samples that are submitted should be accompanied by weather data (easily available from the web) for the time period and region in which the sample was taken.

C22) Pending guidance from Ecology's EAP group regarding stormwater sampling should be mentioned with a note that such guidance will be incorporated to the extent that it will help ensure more cost effective and meaningful sampling.

C23) It is unclear why monitoring will not begin until 2003. This should be changed to require sampling to start in the last quarter of 2002. (S.4.A)

C24) Along with a site visit, Ecology's evaluation of environmental risk should include a review of the literature, maps, and other resources to assess presence of ESA species, porous soils, shallow groundwater, low flows, isolated wetlands, and other site conditions that would increase risk to the environment.

C25) Visual monitoring requirements are a useful tool but are somewhat meaningless without requirements to complete an inspection form, take site photos, or provide and submit other associated documentation regarding the results of the visual monitoring. Without these requirements, the visual monitoring is just a smoke break or stroll around the site to get out of the office for awhile. To help guide the stroll, Ecology should provide a form that permittees could use to record the results of their visual inspections and should require this to be submitted along with the quarterly sampling results.

C26) The permit should state how the proposed "benchmark values" will be used to assess compliance with the Clean Water Act and whether or not effluent limitations and water quality standards are being met.

S5. Reporting and Record keeping Requirements (page 26)

C27) Along with submission and retention of the SWPPA and monitoring reports, the permittees should be required to submit and retain the results of the visual inspections they are required to do. In order reduce the burden to both the permittees and Ecology, the reports should be submitted electronically.

In their recent evaluation of state's enforcement of the CWA, the Office of the Inspector General recommended electronic submission of stormwater reports and cited several options.⁵

C28) S.5.C. Recording of results should include: a) recording weather and rainfall data as reported by the NOAA website or an associated local weather service. This information is easily accessible to the permittee; and b) a signed statement that the information provided is true along with a warning that submitting false information is a violation of law (RCW 40.16). Such provisions are a standard part of many state forms and record submittals; c) maps, photos, or other documentation to help ascertain that the sample was taken at the point of discharge.

C29) S.6.D "No Exposure" Certificate (page 29) must be rewritten. Ecology should not grant these de-facto. Instead, Ecology must make a determination complete with documentation to support their conclusions and provide their findings in writing to the person making the request and to the public records associated with this permit. This element needs to be rewritten to clarify that no certificates will be granted until a thorough review is completed and the results are provided, in writing, to the applicant. As drafted, the permit sets

⁵ Office of Inspector General Audit Report, Water Enforcement: State Enforcement of Clean Water Act Discharges Can Be More Effective. Report No. 2001-P-00013. August, 2001.

up an expectation that the “no exposure” certificate will be granted after 60 days even if Ecology has not reviewed the request. This is not acceptable.

S7. Compliance with Standards (page 29)

C30) S.7.A – Should be deleted for the reasons previously stated.

S.9. Stormwater Pollution Prevention Plan for Industrial Facilities (page 32)

C31) S.9.3. PEER fully supports the requirements to maintain a copy of the SWPP for each facility at the appropriate regional office.

C32) In order to expand public access to these plans, and reduce paperwork, Ecology should require the SWPPS to be sent electronically to HQ so that they could then be posted on the web or otherwise made available to the public.

C33) S.9.A. 4. As stated previously, delete “unless authorized by Ecology.” This creates inequities, loopholes, and an additional workload. Flexibility and numerous grace periods are already provided by Ecology’s policy to provide technical assistance and education prior to enforcement.

C44) Under item 4. add an element (d.) to require that all updates to the SWPP be noted and that the plan’s title page defines the date it was last updated and by whom.

C45) S.9. A.5.b. In order to ensure that all permittees are required to implement AKART, this section needs to be amended to require all permittees to update their SWPPS and associated BMPs by using the most recent Stormwater Management Manual for Western Washington (and Eastern once it is completed). Otherwise, the permit does not require AKART. Existing facilities –which are and will continue to be the majority of the regulated facilities –should not be exempt from requirements to update their SWPPS under the guidance of the new stormwater manual.

C46) S.9.B.1.a.Facility description –permittees should be required to list the following and provided with suggestions for where to get the information if they do not know:

- a.. The watershed they are in (provide weblink with map on it);
- b. The WRIA they are in (weblink to Ecology map);
- c. Whether or not they discharge to 303(D) waters (provide Ecology contact # for this);
- d. List threatened or endangered species associated with the waters they discharge to.

This information is critical to the facility description, contributes to public understanding of permitted facilities in their watershed, and serves as an educational element for the permittee. Gathering the information should not be burdensome as most is available on the web or via a phone call. In addition, the process of gathering the information would likely increase the permittee’s awareness of their watershed and foster more compliance on their part.

C47) S.9.B.1.b. Site Map --This should be amended to allow permittees to submit an aerial photo (readily available from DNR) or other photos showing the entire site and required elements if such a photo would more readily define the site than the drawn map that is currently required. As drafted, the drawing of the map could be difficult for some facilities and a photo might be easier and more descriptive of the site.

C48) S.9.B.2. – Monitoring Plan (page 35) –The monitoring plan elements are a good baseline and should be amended to require a few more specifics including:

- a. photo (not just identification) of the points of discharge;
- b. a check list for visual monitoring that is based on a base checklist provided by Ecology. As previously stated, without some guidance from Ecology the visual monitoring required could easily become a meandering stroll around the site.
- c. A requirement that the identification of “where samples will be taken” include where they will be taken in relation to the point of discharge. To facilitate this, permittees should be encouraged to take a photo of the point(s) of discharge and indicate on it the sample location.

C50) Although not part of the permit requirements, as part of Ecology’s educational efforts on the permit, Ecology could create a model-sampling plan that would address some of the procedural requirements. As these will likely be the same for more of the permittees, they could use a boilerplate document (accessible on the web) to help address these elements provided that Ecology made it clear which elements were boilerplate (i.e. QA/QC information) and which elements would have to be defined specific to the facility.

C51) S.9.B.3. BMPs – the intro should reference the current Stormwater Manual as the primary resources for BMPs.

General Conditions

C52) G5 –The permit should note that failure to have created and implemented a SWPP is a situation where revocation may be required. Although this may be implicitly covered by item G.5.A, because the plans are the cornerstone of compliance, they merit specific mention.

C53) In the “Definitions Section” the permit should provide a definition of AKART, and as part of the definition, define the most current Stormwater Management Manual as the appropriate reference defining AKART measures.

The new draft permit is a significant improvement over the current system and Ecology should be commended for making advances to issue a more effective permit. However, these advances are diluted by the mixing zone, no exposure, and compliance schedule provisions being proposed. These should be removed from the permit as suggested in our comments.

We urge Ecology to fully consider its mandated responsibilities and the most effective way to use the limited funds available to reduce stormwater pollution from industrial facilities. Thank you in advance for your full consideration of these comments and written response to them.